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Pages 4305 - 4335

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. C 10-3561 WHA
)	
GOOGLE, INC.,)	
)	
Defendant.)	San Francisco, California
)	May 21, 2012

TRANSCRIPT OF PROCEEDINGS

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P R O C E E D I N G S

MAY 21, 2012

9:33 A.M.

(The following proceedings were held in open court,
outside the presence of the jury.)

THE COURT: Good morning.

(Counsel greet the Court.)

THE COURT: Everyone have a seat.

I hope you all enjoyed watching the eclipse
yesterday. I certainly did.

We have a note from the jury: Please have question
number 2 and the answer re-read regarding what the instructions
can refer to in the '104 Patent.

So have you two agreed on what should be read back?

MR. JACOBS: Yes, Your Honor.

THE COURT: What is that?

MR. JACOBS: 4263, line 10.

MR. VAN NEST: 3.

MR. JACOBS: Line 10.

MR. PETERS: 3 works.

THE COURT: 4263, line 3, to where?

MR. VAN NEST: I have 4264, line 21.

(Jury enters at 9:35 a.m.)

THE COURT: All right. Welcome. Please be seated.

Everyone feeling good over there health-wise? You

1 are keeping in good health?

2 (Jurors respond affirmatively.)

3 **THE COURT:** Washing your hands. Watch the eclipse?

4 **JUROR MR. RUTHERFORD:** I did. Very cool.

5 **THE COURT:** So you have sent us a new note. I'll
6 read you your new note, which refers to an old note.

7 "Can we please have question #2 and the
8 answer to re-read? (Regarding what the
9 instructions can refer to in the '104
10 Patent)"

11 We think we know what you're referring to here, so
12 the court reporter -- the lawyers and I have agreed on what it
13 looks like you're asking about, and the court reporter will do
14 exactly what you've requested and just reread the prior
15 question and answer. So we will pause while the court reporter
16 does that.

17 (Designated portion of the transcript was read to the
18 jury.)

19 **THE COURT:** All right. We think that has answered
20 what you have asked us to read back. If it does not, we would
21 be happy to consider another note to get at what you're asking
22 for. Okay?

23 So, please, go back to the jury room and continue
24 your deliberations.

25 (Jury out at 9:39 a.m.)

1 **THE COURT:** Okay. Please be seated.

2 While I have you all here, are there any issues,
3 anything that the lawyers need from the Court?

4 **MR. JACOBS:** Nothing from us, Your Honor.

5 **MR. VAN NEST:** No, Your Honor. Thank you.

6 **THE COURT:** All right. We will stand by for the next
7 note.

8 (Laughter)

9 (Proceedings in recess from 9:40 to 10:47 a.m.)

10 **THE COURT:** Okay. Back to work. Please be seated.
11 We'll take these notes. Have you seen these three
12 notes?

13 **MR. VAN NEST:** We have, Your Honor.

14 **THE COURT:** All right. The first note is --

15 **THE CLERK:** They are time stamped.

16 **THE COURT:** Yes. They are not numbered, but they do
17 have times.

18 10:10 a.m. Julie Chiu:

19 "Can a determined numeric reference in the
20 instructions become a symbolic reference
21 because of what happens downstream?"

22 And then there is another question, by Greg Thompson,
23 five minutes later:

24 "Regarding the symbolic reference issue in
25 the '104 claims we have this question.

1 "Does the resolution of symbolic references
2 need to happen immediately i.e. at the field
3 ID table position in the demonstration?

4 "Or can the instructions be considered to
5 contain a symbolic reference by virtue of
6 linking of numeric references that occur
7 first followed by resolution, such as the
8 set-up in the demo with the string ID table,
9 string data & class columns?"

10 So let's deal with those two issues.

11 **MR. JACOBS:** We believe the jury is asking questions
12 about claim scope, that those questions should be answered
13 directly.

14 On the question at 10:10 a.m., "Can a determined
15 numeric reference in the instructions become a symbolic
16 reference because of what happens downstream?" the answer
17 should be yes.

18 There is no requirement in the Court's definition of
19 symbolic reference that you look only at what happens
20 immediately to the right on the chart.

21 Similarly, with respect to the question at 10:15,
22 "Does the resolution of symbolic references need to happen
23 immediately i.e. at the field ID table position in the
24 demonstration?" the answer is no for the same reason.

25 And then the answer to the next question, "Or can the

1 instruction be considered to contain a symbolic reference by
2 virtue of linking of numeric references that occur first
3 followed by resolution," the answer to that, for the same
4 reason, is yes.

5 The Court's claim construction imposed no requirement
6 of immediacy or directly. The question is whether the element
7 in question refers to data by other than a numeric location.
8 That is all that is required for a symbolic reference.

9 **THE COURT:** Could you find for me that question No.
10 2? I think you put it in that stack. It was one of the
11 earlier questions that we --

12 **MR. VAN NEST:** I have my copy of it right here, Your
13 Honor.

14 **THE CLERK:** Of the one earlier today?

15 **THE COURT:** Earlier last week. That's not it. This
16 is the one they are referring to in that question.

17 **MR. VAN NEST:** It's No. 2, 5/16, at noon, Your Honor.

18 **THE COURT:** Yes, that's it.

19 Okay. What does the defendant say?

20 **MR. VAN NEST:** Your Honor, both these questions are
21 different versions of the question 2 that you've just asked to
22 look at, as I think Your Honor can see.

23 So with respect to the 10:10 a.m. question from
24 Ms. Chiu, "Can a determined numeric reference in the
25 instructions become a symbolic reference because of what

1 happens downstream?" to be consistent with what you already
2 answered, you would have to say no to that.

3 You said no to a very similar question, No. 2. "Is
4 the interpretation of 'containing' open to inclusion of a
5 process, i.e. the symbolic reference resolution?" The answer
6 to that was "no."

7 And the reason for that is that Dr. Mitchell
8 repeatedly conceded, as I read last week, that the -- the
9 symbolic reference must be contained in the instructions.

10 So, for example, at transcript 3476, line 24:

11 "And it's clear from Claim 11 that the
12 symbolic reference has to be contained in the
13 instructions, right?

14 **"ANSWER:** Yes.

15 "And so that's one of the issues that's in dispute?

16 "Yes.

17 "Essentially, either contained in or in each
18 one of the limitations requires that there be
19 a symbolic reference in the instructions
20 themselves, right?

21 **"ANSWER:** Yes.

22 **"QUESTION:** Yes?

23 **"ANSWER:** Yes."

24 And the converse is also true, at transcript 3483:

25 "And, obviously, as we've established, if the

1 instructions only use numeric references,
2 that doesn't infringe the '104 Patent, right?

3 "ANSWER: Correct.

4 "QUESTION: Because you have to have symbolic
5 references in the instruction in order to
6 infringe?

7 "ANSWER: Yes."

8 Then there was one more, at transcript 3487:

9 "But you would agree with them that whether
10 you're talking about Resolve.c or dexopt,
11 you've got to find a symbolic reference in
12 the instructions?

13 "Yes."

14 So I think it's clear, to be consistent, the answer
15 to Ms. Chiu's question would have to be no.

16 Mr. Thompson, his questions are also of the same
17 sort. The first question he's asking, "Does the resolution of
18 symbolic references need to happen immediately i.e.," the
19 answer to that is either yes, or, the symbolic reference must
20 be contained in the instructions. Either one of those, I
21 think, would answer that.

22 And to his second question, that's really almost
23 identical to the one he asked last week. He says:

24 "Or can the instructions be considered to
25 contain a symbolic reference by virtue of

1 linking of numeric references that occur
2 first followed by resolution ...?"
3 That's almost identical to the question they asked
4 last week:

5 "Is the interpretation of 'containing' open
6 to inclusion of a process, i.e. the symbolic
7 reference resolution?"

8 So that should be answered the same way: No, that
9 doesn't count.

10 So, again, I think to be consistent with the
11 testimony and consistent with the agreement of the experts that
12 the symbolic reference has to be in the instruction, the answer
13 to Ms. Chiu's question has to be no. The answer to
14 Mr. Thompson's second question has to be no. The answer to his
15 first question would either be yes, or a statement that the
16 symbolic reference must be contained in the instructions.

17 **THE COURT:** All right.

18 **MR. VAN NEST:** That's all I have.

19 **THE COURT:** All right. What do you have to say,
20 Mr. Jacobs?

21 **MR. JACOBS:** The "contained" question was a very
22 narrow question. The Court may recall that when it was posed,
23 I argued that in order to understand it contextually it should
24 be answered with reference to the process. And the Court's
25 conclusion was no, "contained" -- the "contained in" question

1 is a very narrow question.

2 We are not now asking the question, what is
3 "contained in"? We're asking, how do we determine whether that
4 which is contained is a numeric or symbolic reference? So
5 those are two entirely different questions.

6 The answer to the quality of the value in the
7 instructions, of course, depends on what happens downstream
8 from it.

9 Among other things, the Court's definition says that
10 a symbolic reference is a reference that's resolved dynamically
11 rather than statically. So, of course, we're looking at
12 process aspects in order to determine whether a reference is a
13 symbolic reference.

14 And, then, again, as stated earlier, there is no
15 limitation in the Court's construction to directness or
16 immediacy. The question is merely whether a symbolic
17 reference -- a putative symbolic reference is a reference that
18 identifies data by a name other than the numeric reference
19 memory location of the data.

20 And there was ample evidence in the record that what
21 Google would call a numeric reference, because it -- it
22 immediately is a pointer to a field in a table, is, in fact, a
23 symbolic reference because it points indirectly to data in a
24 data object that that -- in that process results in resolution
25 of that reference to a numeric reference. And we have all

1 sorts of evidence from Google's documentation and from its
2 witnesses that that's exactly what goes on.

3 So absent a restriction in the Court's construction
4 to "directly," the answer has to be as I posited earlier. If
5 the Court said the term "symbolic reference" shall be construed
6 as a reference that directly identifies data by a name other
7 than the numeric reference location, that's a different
8 construction.

9 And that's not the construction the Court gave us.
10 It's not the construction the jury should hear -- it's not a
11 construction that the answers to the jury's questions should be
12 based on.

13 **MR. VAN NEST:** May I make one more observation, Your
14 Honor?

15 **THE COURT:** Okay.

16 **MR. VAN NEST:** Both Ms. Chiu's question and
17 Mr. Thompson's second question indicate that the jury is
18 essentially saying, "Can a determined numeric reference" --
19 that's what Ms. Chiu says. So she's saying, if the reference
20 in the instructions has been determined to be numeric, can it
21 become symbolic downstream? The answer to that has clearly got
22 to be no. Even Dr. Mitchell says, if the instructions are
23 using numeric references there's no infringement.

24 That's the gist of Mr. Thompson, in his second
25 question, "Can the instructions be considered to contain a

1 symbolic reference by virtue of linking of numeric references
2 that occur first ...?"

3 Clearly, the jury is looking at the references that
4 appear in the instructions as numeric, and someone is asking,
5 well, they can become symbolic because of downstream activity.

6 That's just not the basis on which the case was
7 tried. That's not the basis on which the experts formed their
8 opinion. Dr. Mitchell was crystal clear, the symbolic
9 reference has to be in the instructions, and if what's in the
10 instructions is numeric reference there is no infringement.

11 So I don't see that -- I don't see these could be
12 answered any other way.

13 **MR. JACOBS:** May I, Your Honor? Because that's a new
14 issue.

15 **THE COURT:** Wait a minute.

16 (Pause)

17 **THE COURT:** All right. Who wanted to say something?

18 **MR. JACOBS:** Merely, Your Honor, that Google is
19 imposing another limitation on the Court's construction of
20 exclusivity. So Google would read, the term symbolic reference
21 shall be construed as a reference that identifies all of the
22 data that it identifies by a name other than the numeric memory
23 location of the data, or would add some word of "exclusively"
24 or "only" in the Court's construction.

25 This issue was briefed in the JMOL briefing.

1 Google -- we posited in our opening brief that Google was
2 imposing these additional limitations. While Google criticized
3 our approach, they actually didn't say in their opposition
4 brief that our reading of their construction, or, put it
5 differently, that we were correctly reading the Court's
6 construction, was incorrect.

7 So it's important to understand that as backdrop. We
8 have actually looked at this issue in briefing to the Court,
9 and we made it clear in our opening brief that there's no
10 requirement of directness and there's no requirement of
11 exclusivity.

12 In other words, a reference that identifies some data
13 by a name other than the numeric memory location of the data
14 qualifies as a symbolic reference, even if it, as Google
15 argues, is a pointer to a field in a table. And, therefore,
16 has -- gives support -- by virtue of it being a pointer in a
17 field in a table, gives some support to Google's argument that
18 it is a numeric reference.

19 So that's the back and forth, and that's where we
20 are. There is no limitation of directness and no limitation of
21 exclusivity, and that's why the answer should be as we
22 suggested.

23 We also suggest that the answers be just as direct to
24 these questions as they were to the question on "contained."

25 **THE COURT:** I don't agree with either of you. I will

1 give my own instruction to the jury, and you can all preserve
2 your positions for appeal.

3 The next question is:

4 "For the purpose of determining claim
5 language of the '520 Patent, is 'stack'
6 synonymous with 'memory'? If so, is the
7 definition of 'memory' confined to stack?"
8 What do you say to this one?

9 **MR. JACOBS:** Once again, clear questions with clear
10 answers. Stack is not synonymous with memory. And the
11 definition of memory is not confined to stack.

12 In the specification, there is a discussion of the
13 stack as it relates to memory. Stack is a portion of the
14 memory.

15 But the claim is not limited to stack. The Court so
16 instructed the jury when I objected to a closing argument which
17 suggested that the stack limitation be read into the asserted
18 claims.

19 There are dependent claims that recite a stack and
20 limit the claims to stack-based static array initialization.
21 But the asserted claims are not limited to stack.

22 So, once again, we suggest clear nos to both of those
23 questions.

24 **THE COURT:** What do you say?

25 **MR. VAN NEST:** Your Honor, I don't think that would

1 be right. The only statement in the specification is the one
2 Mr. Jacobs recited. It says, a stack is a portion of memory
3 used by the methods in the Java programming environment.

4 That's in Column 2, at lines 18 through 21.

5 **THE COURT:** Isn't this the thing that you were trying
6 to -- there was an objection, and I instructed the jury that
7 you can't read examples into the claims. Isn't that the very
8 point?

9 **MR. VAN NEST:** I'm not sure. The patent says, again,
10 at Column 5, "The stack is a portion of memory for use in
11 storing operands."

12 So what I would say on the first one -- I mean, all
13 stack is memory. All stack is memory. Stack is a portion of
14 memory. So I'm not sure what "synonymous" means.

15 But it's also true, as respects the second sentence,
16 that the definition of memory isn't confined to stack. But
17 stack -- all stack is memory. All memory is not stack.

18 So I think some -- something along the lines of,
19 responding to the first question, that stack is not synonymous,
20 but stack is a portion of or stack is memory, would have to be
21 said with --

22 **THE COURT:** You both agree that stack is memory, but
23 memory can be more than stack?

24 **MR. VAN NEST:** Yes.

25 **THE COURT:** Is that a correct statement?

1 **MR. VAN NEST:** We would agree with that.

2 **MR. JACOBS:** Stack is a portion -- is an allocated
3 portion of the memory.

4 I think it could be quite confusing to give the jury,
5 though, more than it has asked for in this context. They have
6 asked a very clear question. The word "synonymous" needs no
7 explication. Is stack synonymous with memory? No.

8 **MR. VAN NEST:** But, again, that would be -- that
9 would be confusing because I think we both agree stack is
10 memory. So your statement is fine with --

11 **THE COURT:** Is it a correct statement that stack is a
12 portion of memory, and that memory can be greater than stack?

13 **MR. VAN NEST:** Yes. That is correct.

14 **MR. JACOBS:** That's factually correct, but that's not
15 the question they're asking. They're asking, "For the purposes
16 of determining claim language of the '520 Patent, is 'stack'
17 synonymous with 'memory'?"

18 **THE COURT:** Does "stack" even show up?

19 **MR. JACOBS:** Doesn't show up in the asserted claims.
20 But the argument plainly got some traction, that there's no
21 stack in Android; therefore, there's no memory within the
22 meaning of the asserted claims. And that's what they're
23 confused by.

24 "For the purposes of determining claim language of
25 the '520 Patent, is 'stack' synonymous with 'memory'?"

1 Absolutely not.

2 **MR. VAN NEST:** But, again, Your Honor, the statement
3 that you made is correct. Either version of that is correct --

4 **THE COURT:** Well, all right. Let's bring the jury
5 in.

6 You lawyers aren't going to agree on anything, so
7 we're going to bring the jury in and I'll do my best.

8 (Jury enters at 11:10 a.m.)

9 **THE COURT:** Okay. Welcome back. Be seated.
10 Three notes.

11 Ms. Chiu writes:

12 "For the purposes of determining claim
13 language of the '520 Patent, is 'stack'
14 synonymous with 'memory'? If so, is the
15 definition of 'memory' confined to stack?"

16 Answer to both questions: No.

17 End of that one.

18 Now we go to two questions that are going to take a
19 little bit more time for me to try to answer. I'm sorry, I --

20 Ms. Chiu writes: "Can a determined numeric reference in the
21 instructions" -- and here I will pause to add, she's not
22 talking about the instructions to the jury. She's talking
23 about computerized instructions.

24 "Can a determined numeric reference in the
25 instructions become a symbolic reference

1 because of what happens downstream?"

2 "Can a determined numeric reference in the
3 instructions become a symbolic reference
4 because of what happens downstream?"

5 Before I answer that question, I'm going to read the
6 one from Mr. Thompson.

7 "Regarding the symbolic reference issue in
8 the '104 claims, we have this question.

9 "Does the resolution of symbolic references
10 need to happen immediately i.e. at the field
11 ID table position in the demonstration?

12 "Or can the instructions be considered to
13 contain a symbolic reference by virtue of
14 linking of numeric references that occur
15 first followed by resolution, such as the
16 set-up in the demo with the string ID table,
17 string data & class columns?"

18 I'll read it again because that was a long question.

19 "Regarding the symbolic reference issue in
20 the '104 claims, we have this question.

21 "Does the resolution of symbolic references
22 need to happen immediately i.e. at the field
23 ID table position in the demonstration?

24 "Or can the instructions be considered to
25 contain a symbolic reference by virtue of

1 linking of numeric references that occur
2 first followed by resolution, such as the
3 set-up in the demo with the string ID table,
4 string data & class columns?"

5 So the '104 Patent claims call out symbolic
6 references, symbolic references, symbolic references.
7 Sometimes there are -- numeric references are called out in the
8 claim language.

9 In the earlier instructions to the jury, I defined
10 symbolic reference to mean the following:

11 "The term 'symbolic reference' means a
12 reference that identifies data by a name
13 other than the numeric memory location of the
14 data, and that is resolved dynamically rather
15 than statically."

16 To repeat:

17 "The term 'symbolic reference' means a
18 reference that identifies data by a name
19 other than the numeric memory location of the
20 data, and that is resolved dynamically rather
21 than statically."

22 All right. Now, I'm going to try to give you -- this
23 is not going to be a yes or no answer. I'm going to do my best
24 to answer what I think your question is on both of these items.

25 If the instructions -- and I'm talking about the

1 computer instructions, not the jury instructions.

2 If the instructions contain a numeric reference, then
3 it does not somehow turn into a symbolic reference on account
4 of what happens downstream.

5 But, how do you determine whether it is a numeric
6 reference in the first place? That's an important question.

7 In determining whether the item is numeric versus
8 symbolic reference in the first place, you must consult the
9 definition that I gave you of what a symbolic reference is.

10 Again, a symbolic reference is a reference that
11 identifies data by a name other than the numeric memory
12 location of the data and that is resolved dynamically rather
13 than statically.

14 So you ask that question. You look at whatever is in
15 that little box and you say, does that identify data by a name
16 other than the numeric memory location of the data?

17 If the answer to that is that it identifies a numeric
18 memory location of the data, then it is not a symbolic
19 reference; it's a numeric reference. And it doesn't get
20 transmogrified into a something else on account of what happens
21 downstream.

22 But you do have to consider what happens downstream
23 to find -- to at least figure out whether or not the item that
24 is in that box is referring to the numeric memory location of
25 the data. You've got to look at least that far downstream in

1 order to see what it's referring to.

2 But, once you do that -- and if you decide it's a
3 symbolic reference, great. If you decide it's a numeric
4 reference, that's great, too. But it doesn't then change
5 because the computer marches on to one instruction after the
6 other, and so forth.

7 I think that's the best I can do for you here. So,
8 we welcome your notes. You send us as many notes as you want,
9 and we will do our best to answer them. That's the best I can
10 do on this one.

11 You may return to the jury room and continue your
12 deliberations.

13 (Jury out at 11:18 a.m.)

14 **THE COURT:** Please be seated.

15 Any further objections anyone wants to put on the
16 record, now is the time.

17 **MR. JACOBS:** For the reasons previously stated, Your
18 Honor, I believe the answer should have been crisp, as
19 proposed.

20 **THE COURT:** And?

21 **MR. VAN NEST:** And, Your Honor, we'll object to the
22 instruction that Your Honor gave on the '520. I think that's
23 likely to confuse the jurors in light of the testimony they've
24 heard and the evidence that was presented.

25 **THE COURT:** You know, I hope both sides learn

1 something from this about patent cases. It's not as easy as
2 you started to think when you brought this lawsuit or you
3 started defending this lawsuit. All of the brilliant things
4 that you can do in your rooms with all your white boards and
5 all of you understand them perfectly, things don't come down
6 that way in the courtroom sometimes. And I'm pointing my
7 fingers at both of you.

8 But, this is our system. And I believe in it
9 totally. We're going to do the best we can with the jury
10 system we've got.

11 And whoever loses on this, too bad for you. You'll
12 have to take it up with the federal circuit.

13 I'll keep you posted on the next note.

14 **MR. VAN NEST:** Thank you, Your Honor.

15 **MR. JACOBS:** Thank you, Your Honor.

16 (Proceedings in recess from 11:20 to 12:57 p.m.)

17 **THE COURT:** Okay. Be seated, please.

18 Next note says, from Megan:

19 "If all other claim limitations are met, is
20 it true that the DVM would be infringing the
21 '104 patent via any resolution of a symbolic
22 reference anywhere in the data fields (as
23 depicted in the demonstrative)?"

24 All right. What do we say to this?

25 **MR. JACOBS:** The answer to the question is yes.

1 One way to answer the question would be to answer it
2 yes. Another way to answer the question would be to recite the
3 definition of the -- the Court's construction of "resolving,"
4 which is at least determining the numerical memory location
5 reference that corresponds to the symbolic reference, and
6 noting that there's no additional limitation on -- in that
7 definition as to when, where, how the resolution occurs.

8 Both of those would be helpful.

9 **MR. VAN NEST:** Your Honor, I think this is really the
10 same question we've been getting in a little, slightly
11 different form, but I think the answer is clearly no.

12 If the question is, does any resolution of a symbolic
13 reference anywhere in the data fields infringe? No, of course
14 not. You've told them a number of times that the symbolic
15 reference has to be in the instructions. That was admitted to
16 by the expert. It's got to be there.

17 So asking whether any resolution of a symbolic
18 reference anywhere in the data fields qualifies is just like
19 asking whether we can consider all this downstream stuff that
20 they've been talking about.

21 I have no problem with Your Honor rereading claim
22 constructions, if that is appropriate. But I think the answer
23 to this question is clearly no. Otherwise, it ignores the way
24 the case has been tried, which is that both experts said you
25 have to have a symbolic reference in the instructions

1 themselves. And what is resolved is that reference.

2 In other words, any resolution has to be of the
3 reference that's in the instruction itself. That's pretty
4 clear from the claim language, which says, you determine a
5 numeric reference corresponding to said symbolic reference.
6 Said symbolic reference is the reference that's in the
7 instruction itself.

8 So I think the clear answer to this is no. I don't
9 object to you reading claim construction if Your Honor feels
10 that's appropriate. But we certainly couldn't answer this yes,
11 consistent with the way in which the case has been tried and
12 your prior instructions to the jury.

13 **MR. JACOBS:** Briefly, Your Honor.

14 We're mixing issues again. This question starts out
15 with, "If all other claim limitations are met," and then
16 narrowly focuses on a where question as to resolution.

17 So the jury, in asking the question this way, or
18 Ms. Gallo, in asking the question this way, says: Okay, I get
19 it. The symbolic reference has to be contained in the
20 instructions. I understand from what the Court said in the
21 last question that we can look downstream to determine the
22 character of the symbolic reference. Now I'm trying to figure
23 out whether there's a limitation as to where resolution takes
24 place.

25 And there is no such restriction in the Court's

1 construction or in the claim language. And it would be a
2 mistake to let the jury think that there's yet another
3 narrowing of the claims that has not occurred.

4 **MR. VAN NEST:** May I?

5 **THE COURT:** You may. Go ahead.

6 **MR. VAN NEST:** I just don't read this question the
7 same way, Your Honor, because this is the issue they've been
8 debating all along.

9 **THE COURT:** That's what you think. I'm not sure
10 that's it.

11 When it says "If all other claim limitations are
12 met," and then the question goes on, but that other -- the rest
13 of the sentence does not track -- I don't even know what
14 claim -- what do they mean "other"? Which one are they leaving
15 out when they say "other claim limitations"?

16 **MR. VAN NEST:** I think just -- if Your Honor thinks
17 that's ambiguous, then all the more reason to be cautious.

18 I certainly don't think that this implies we found
19 every other element; now we're looking at this element because
20 this element hasn't been debated. This element of resolution.

21 The debate has been what's the -- what's the nature
22 of the reference contained in the instruction? So, again,
23 that's the issue that's been debated all week last week and,
24 apparently, again today.

25 And so I would -- I would urge the Court to be

1 consistent with your prior instructions or seek clarification
2 from the jurors.

3 Again, if we get away from resolution of a symbolic
4 reference that's in the instruction itself, then we're
5 departing from the claim construction and the way the case is
6 tried and the admissions by the experts on both sides.

7 **THE COURT:** All right. Let's bring the jury in. I
8 think they said they weren't going to go home until they got an
9 answer to this.

10 (Jury enters at 1:04 p.m.)

11 **THE COURT:** Please be seated.

12 We have another note. Thank you for your note. It's
13 from Ms. Gallo, right? I will read it.

14 "If all other claim limitations are met, is
15 it true that the DVM would be infringing the
16 '104 patent via any resolution of a symbolic
17 reference anywhere in the data fields (as
18 depicted in the demonstrative)?"

19 Now, I want to begin by saying, what is a limitation?
20 In these paragraphs that follow, these indented paragraphs,
21 each one of those is its own limitation. So, usually, a claim
22 has several paragraphs, and each one of those is regarded as a
23 limitation.

24 So one of the problems with this question is that I'm
25 not sure we're using the term "claim limitation" correctly.

1 I want to back up and say, if all claim limitations
2 are met, of course, there's infringement because that's the
3 definition. All claims. Three out of three is enough. Four
4 out of four is enough. Three and a half out of four is not
5 enough.

6 I explained all that to you once before. I don't
7 think that's what you're getting at here, but it's not entirely
8 clear to me what you are getting at.

9 So if what this is saying is, if three out of the
10 four are met but one out of the four we are still debating, and
11 is this the answer to the one out of the four ... all right,
12 maybe that's what you're trying to ask. But, if that's what
13 you're trying to ask, the way you phrased this question is
14 not -- I can't give you the answer to the facts. That's where
15 the jury comes in. I can tell you what the law is. But
16 where -- you are the ones that have to apply the facts to the
17 law.

18 So I want to go back to your question. You say
19 "... is it true that the DVM would be infringing the '104
20 patent via any resolution of a symbolic reference anywhere in
21 the data fields (as depicted in the demonstrative)?"

22 Well, the demonstrative is not in evidence. It's not
23 in evidence. It's not in the jury room. Maybe you made some
24 notes.

25 You're asking me to tell you how to evaluate the

1 evidence. This is an evidentiary point.

2 Now, I gave you some instructions on what does it
3 mean, "resolve" and "resolving." You know that I gave you
4 those instructions. I've told you what a symbolic reference
5 was. I gave you those instructions. I've answered several
6 questions about the -- you know, you've had on this subject.

7 But this particular -- you're asking would something
8 be infringing. You're not asking me what would be a claim
9 construction issue or what does this claim mean. You're asking
10 me does something infringe if.

11 I don't think I -- the way you phrased this, it's too
12 much fact and not enough law. So I cannot give you any help on
13 the way you phrased this question.

14 Sometimes you've gotten closer to a legal question.
15 I can answer that. But this one you're basically asking me,
16 Judge, what is the answer here?

17 Well, that's where the jury comes in. That's why we
18 try these cases to a jury in this great country because you
19 will figure it out.

20 So, that's the best I'm going to do for you on this.
21 I suggest you look at the law, which is the definitions I gave
22 you on resolve and resolving, symbolic reference, the other
23 answers to these other questions you've given me.

24 And if you want to try your hand at a different
25 question, I'll do my best to answer it, as long as it is

1 getting at what is the law, what do these words in the claim
2 itself mean.

3 That is my duty to try to tell you what those -- but
4 when it gets down to here's the way we think maybe this machine
5 works and how -- that's facts, not law. And I'm not going to
6 get bogged down in that because that's not supposed to be my
7 job. That's supposed to be your job. And I respect your
8 province. And I'm going to stay out of it.

9 So, I'm sorry I can't answer every question. I wish
10 I could. But, really, I trust the jury to get it right. I
11 know you're working hard on this. So I'm just going to send
12 you back to continue your work.

13 Now, I know it's 1:00 o'clock. You don't have to
14 leave at 1:00 o'clock. But is this one of those days where
15 you're leaving at 1:00 o'clock?

16 **FOREMAN THOMPSON:** Yes.

17 **THE COURT:** So are you taking off right now? You're
18 going to adjourn at the end here? It's up to you. You can
19 stay until 7:00 p.m. if you want.

20 (Laughter)

21 **THE COURT:** I want to make sure the lawyers are
22 present so we can answer your note. If you're going to be
23 leaving, just let us know. When you go back in the jury, send
24 out a note, let us know what you plan to do. If you plan to
25 stay, good. We'll be right here, waiting for your next note.

1 Okay?

2 **FOREMAN THOMPSON:** Okay.

3 **THE COURT:** Great. Thank you.

4 (Jury out at 1:10 p.m.)

5 **THE COURT:** Please be seated.

6 I have a question. Is this '104 Patent, is this the
7 one that -- where does it stand on re-exam in the PTO, on the
8 '104?

9 **MR. JACOBS:** This is the one that has the preliminary
10 rejection, Your Honor.

11 **THE COURT:** Well, all right. And the other one has
12 gotten all the way through; is that it?

13 **MR. JACOBS:** That's correct.

14 **THE COURT:** So not to be too negative about this, but
15 if we have a hung jury on these issues, you all should be
16 thinking about what our next steps are for case management
17 purposes. We're not there yet. Maybe we will have a verdict,
18 or at least a partial verdict.

19 So we'll be in recess. As soon as we get their note
20 about how long they are going to be in session today, we'll let
21 you know.

22 **MR. VAN NEST:** Thank you, Your Honor.

23 **MR. JACOBS:** Thank you, Your Honor.

24 (At 1:11 p.m. the proceedings were adjourned during
25 further jury deliberations.)

CERTIFICATE OF REPORTER

I, KATHERINE POWELL SULLIVAN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 10-3561 WHA, **Oracle America, Inc., vs. Google, Inc.**, were reported by me, certified shorthand reporter, and was thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings at the time of filing.

/s/ Katherine Powell Sullivan

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U.S. Court Reporter

Monday, May 21, 2012

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